



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

has derived from the infringement, this distinction would seem to be unwarranted.

The court in the recent case of *Peerless Brick Mach. Co v. Miracle Pressed Stone Co.* (1910) 181 Fed. 526, applied the foregoing principles to a suit in equity in which it was found that the defendant, by selling the articles made by him with an infringing machine, had realized a substantial profit and had at the same time decreased the number of the plaintiff's sales. As it appeared that the plaintiff's machine was the only one then in the market which could accomplish the desired result, it was properly held that the defendant's entire profits were attributable to the infringement, and consequently could be recovered by the plaintiff, but that since a recovery could not be had for the same infringing sales both as profits of the defendant, and as damages to the plaintiff, the item of lost sales should be disallowed.

THE DOCTRINE OF ESTOPPEL AND THE LAW OF LICENSES.—The question as to how far the acceptance of a license to place a burden on another's land will enable the licensee to maintain this burden is easily answered on principle. Since the right thus acquired is in its nature a mere personal privilege, it is revocable at will<sup>1</sup> and any circumstance inconsistent with its continued existence<sup>2</sup> such as the death of either party<sup>3</sup> or a conveyance of the property affected<sup>4</sup> operates *ipso facto* to terminate the license. Although it would seem evident that any act on the part of the licensee would be ineffectual to change the fundamental nature of such a right<sup>5</sup> yet the courts, realizing that a logical application of the above principle would in many instances be productive of hardship, have, in such cases, attempted to find some theory upon which to declare the license irrevocable. The undesirability of permitting the creation of interests in land by informal grant has, however, deterred them from affording the full measure of protection which pure considerations of justice demand.<sup>6</sup>

Accordingly, whatever may have been the occasional result with respect to the extinguishment of property rights,<sup>7</sup> it has been consistently held that a license as such cannot operate to create an interest in land. Whenever, therefore, a licensee is to be allowed to assert a permanent interest in the property of his licensor his claim must be predicated upon the existence of a valid grant<sup>8</sup> rather than upon any peculiar quality of the license. This principle perhaps

<sup>1</sup>Wood v. Leadbitter (1845) 13 M. & W. 838; see Fentiman v. Smith (1803) 4 East 107.

<sup>2</sup>See Lockhart v. Geir (1882) 54 Wis. 133; Dark v. Johnston (1867) 55 Pa. St. 164; Hodgkins v. Farrington (1889) 150 Mass. 19.

<sup>3</sup>Lambe v. Manning (1898) 171 Ill. 612; Bridges v. Purcell (N. C. 1836) 1 Dev. & B. 492.

<sup>4</sup>Carter v. Harlan (1854) 6 Md. 20; Eggleston v. N. Y. & H. Ry. (N. Y. 1859) 35 Barb. 162.

<sup>5</sup>See Bryan v. Whistler (1828) 8 B. & C. 288; Dodge v. McClintock (1867) 47 N. H. 383; Foot v. N. H. & Northampton Co. (1854) 23 Conn. 214; Crossdale v. Lanigan (1892) 129 N. Y. 604.

<sup>6</sup>Crossdale v. Lanigan *supra*.

<sup>7</sup>Morse v. Copeland (Mass. 1854) 2 Gray 302; Washburn, Easements 726; cf. Liggins v. Inge (1831) 7 Bing. 682.

<sup>8</sup>Thompson v. Gregory (N. Y. 1809) 4 Johns. 81; see Nunnally v. Southern Iron Co. (1894) 94 Tenn. 397.

explains the real significance of the rule that a license which comprises or is coupled with a grant is non-countermandable. Those decisions, however, which declare the irrevocability of a license coupled with an interest in a chattel on the vendor's land<sup>9</sup> are not easily brought within the above principle and may perhaps be best considered as an exception prompted by the obvious necessity of preserving the vendee's property rights from virtual destruction by the act of the vendor.

Although the courts have thus refused openly to sanction the creation of interests in land by informal grant they have, nevertheless, been ready to afford the licensee equitable relief against a revocation of his privilege. Whenever the right to maintain the burden is founded upon a contract exhibiting the elements necessary to bring it within the doctrine of specific performance no reason appears why, irrespective of the law of licenses, such performance should not be decreed<sup>10</sup> and many of the decisions which apparently hold that a license is irrevocable after expense has been incurred are to be explained on this theory. Obviously, this principle has no application in the absence of a definite agreement between the parties;<sup>11</sup> yet the courts have not hesitated to formulate such a contract in order to afford the desired relief.<sup>12</sup> The doctrine most frequently invoked, however, even in actions at law, is that of equitable estoppel. Thus it is said that the licensor, having permitted the expenditure of money in reliance on a right which he has created, will not be allowed to revoke it to the prejudice of the licensee.<sup>13</sup> The doctrine of estoppel of course requires as a prerequisite to its operation the existence of an actual misrepresentation upon which the party invoking it had reason to rely. Surely the act of granting the license does not involve any representation as to the duration of the rights acquired under it, nor does the licensor's subsequent acquiescence in the expenditure afford a sufficient reason for believing that the privilege will not be withdrawn.<sup>14</sup> Moreover, there would seem to be no ground for imposing upon the licensor a duty to interfere with the other party in the enjoyment of his privilege and it may well be said that he has a right to assume that all such acts are done in contemplation of the unstable character of the right and for reasons satisfactory to the licensee. It is, indeed, quite possible to conceive a situation in which the licensor could be charged with actual misrepresentation but where the only circumstance relied upon is the uninterrupted expenditure of money by the licensee, it is submitted that no sufficient ground upon which to base an estoppel is presented.

A proper application of the above doctrine, although terminating the relation of licensor and licensee, is not conclusive as to the full rights of the parties. After a revocation the licensor may remove any obstruction which has been placed on his property during the continu-

---

<sup>9</sup>Wood v. Manley (1839) 11 Ad. & E. 34.

<sup>10</sup>Metcalf v. Hart (1891) 3 Wyo. 513; Parkhurst v. Van Courtlandt (N. Y. 1816) 14 Johns. 15.

<sup>11</sup>Wiseman v. Lucksinger (1881) 84 N. Y. 31.

<sup>12</sup>See Rerick v. Kern (Pa. 1826) 14 Ser. & R. 267; Pifer v. Brown (W. Va. 1897) 49 L. R. A., note.

<sup>13</sup>Gibson v. St. Louis Agricultural Ass'n. (1888) 33 Mo. App. 165; Lane v. Miller (1867) 27 Ind. 534; see House v. Montgomery (1885) 19 Mo. App. 170.

<sup>14</sup>See Pifer v. Brown, note *supra*.

ance of the license but manifestly has no power to impose such a duty on the licensee. Where, on the other hand, the structure resulting in the burden is situated on the licensee's land, the licensor cannot enter to destroy it without being guilty of a trespass. Whether he can demand such action on the part of the licensee is a slightly more difficult question. The erection of the structure was rendered lawful by the licensor's express authorization and no principle is apparent by virtue of which a subsequent revocation can impose upon the licensee a duty to remove it.<sup>15</sup> Indeed, it would seem that the licensor must be presumed to have contemplated the natural consequences resulting from the acceptance of the license. The full extent of his rights in such a case is, therefore, to demand that nothing be done to prolong the enjoyment of the privilege and until the structure is destroyed by natural causes the license is practically though not legally irrevocable. This principle may be suggested as affording a proper justification for some of the decisions which hold that a license may operate to extinguish rights in *alieno solo*. Obviously, however, all the cases cannot be explained on this ground for the true line of demarcation is between acts done on the licensee's land and those done on the land of the licensor rather than between licenses which create and those which extinguish property rights.

In a recent case, *Shaw v. Proffitt* (Or. 1910) 110 Pac. 1092, the plaintiff had expended large sums of money in the construction of ditches through the defendant's land and the court, invoking the doctrine of estoppel held that the license, in reliance upon which he had acted, was irrevocable. Although the language of the opinion apparently assumes the existence of an agreement that the right should be a permanent one the facts as reported would seem wholly insufficient to warrant such an inference and in the absence of some circumstance other than the mere acquiescence in the expenditure, it is difficult to support the decision. Surely the undesirability of thus permitting the creation of permanent property rights by informal grant is apparent.<sup>16</sup>

<sup>15</sup>See *Winter v. Brockwell* (1807) 8 East 308. The above theory of this case seems to have been overlooked by the text writers generally, who have found great difficulty in reconciling it with *Fentiman v. Smith supra*, a case decided by Lord Ellenbrough a few years previously. See Gale, Easements 29.

<sup>16</sup>*Crossdale v. Lanigan supra*.